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REFERENCES FOR PRELIMINARY RULINGS

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1. Introduction

1.1. Preliminary rulings in the Community judicial system

A reference for a preliminary ruling is a request from a national court of a Member State to the Court of Justice of the European Community to give an authoritative interpretation on a Community act or a decision on the validity of such an act. In this situation the Court of Justice does not function as a court of appeal which rules on the outcome of the main proceedings before the referring court: it makes



judgment neither on the facts in the main proceedings nor on the interpretation and application of national law. Moreover, in principle, it does not pronounce itself on the concrete application of Community law in the main proceedings before the referring court. Finally, while a preliminary ruling is normally given in the form of a judgment, the ruling is addressed only to the referring court, but not to the parties to the main proceedings. Only the referring court's subsequent decision can be enforced against those parties. As a matter of principle, the preliminary reference procedure is therefore an expression of an interplay and allocation of tasks between national courts and the Court of Justice.¹ It is this interplay which is the subject of this book.

Already the Treaty establishing the European Coal and Steel Community (ECSC)—the first stone laid in founding the European Union—made provision from 1951 for the preliminary reference procedure.² However, it has been Article 234 (originally Article 177) in the Treaty of Rome of 1957 that has ensured the prominent position of the preliminary reference procedure on the legal map of Europe. By this provision the six original Member States of the European Economic Community gave their national courts the possibility, and in some cases the obligation, to make preliminary references. This Article states as follows:

- The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
- (a) the interpretation of this Treaty;
 - (b) the validity and interpretation of acts of the institutions of the Community and of the ECB;
 - (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

The preliminary ruling procedure has several important functions:

- It gives national courts access to help in resolving interpretative issues concerning Community law.
- It helps to ensure the uniform interpretation of Community law throughout the Community.

¹ For a discussion as to whether the relationship between national courts and the Court of Justice is in reality hierarchical or rather has the character of cooperation between equals see T de la Mare, 'Article 177 in Social and Political Context' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (1998) 215, 227–8, and A Dashwood and A C Johnston, 'Synthesis of the Debate' in A Dashwood and A C Johnston (eds), *The Future of the Judicial System of the European Union* (2001) 55, 58–9.

² Art 41. The ECSC Treaty expired on 23 July 2002.



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- It helps to ensure the effective application of Community law, just as it contributes to domesticating Community law and moving Community law away from assuring compliance only through a system of international surveillance so that it also contains a supplementary system of private enforcement that is not influenced by political discretion.
- It plays an important role in the political integration of the Community.³

Preliminary rulings have played a crucial role in the development of Community law, and some of the most fundamental principles of Community law have been laid down in connection with preliminary rulings. This includes, for example, such central principles as direct effect and supremacy of Community law. One consequence of the preliminary ruling procedure has been to bind the national courts more closely to the Court of Justice. This has meant that these courts, functionally speaking, also act as Community courts.⁴

As Article 234 has direct effect, many Member States have made no supplementary national legislation regulating when and how a preliminary reference should be made or how a preliminary ruling should be applied by the national courts. Instead, such questions are often regulated by a combination of case law of the Court of Justice and general procedural codes of the different Member States.

1.2. The structure of this book

This book examines the different aspects of the preliminary reference procedure. It is divided into 13 chapters which broadly mirror the order in which the various issues connected with a reference under Article 234 arise for a national court.

In this introductory chapter we first give an account on the development of the preliminary procedure (Section 2). Thereafter we give a brief outline of the different types of preliminary references in the Community system (Section 3). We then (Section 4) give a short account of the broadly similar reference procedure laid down in the EEA Agreement followed by an account of other ways of

³ This fourth aspect will not be dealt with in this book. The question is dealt with by, among others, H Rasmussen, *On Law and Policy in the European Court of Justice* (1986) chs 8 and 14; J Weiler, 'Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration' (1993) *Journal of Common Market Studies* Vol 37, No 4 December 1999 417, 421ff; M Maduro, *We, the Court—The European Court of Justice & the European Economic Constitution* (1998) 9 and 26ff; A Burley and W Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) *International Organization* Vol 47, No 1 ss 41–76 1993; W Mattli and A Slaughter, 'Revisiting the European Court of Justice' (1998) *International Organization* Vol 52, No 1 January 1998 ss 177–209; and J Pitarakis and G Tridimas, 'Joint Dynamics of Legal and Economic Integration in the European Union' (2003) *European Journal of Law and Economics* Vol 16, No 3 November 2003 ss 357–68.

⁴ R Lane, 'Article 234: A Few Rough Edges Still' in M Hoskins and W Robinson (eds), *A True European—Essays for Judge David Edward* (2003) 327, 327; M Dougan, *National Remedies Before the Court of Justice—Issues of Harmonisation and Differentiation* (2004) 3; and C Barnard and E Sharpston, 'The Changing Face of Article 177 References' (1997) 34 *CML Rev* 1113, 1113ff.



obtaining guidance on interpretation of Community law, namely questions to the Commission and the European Ombudsman (Section 5). The chapter ends with a discussion of what future changes one might envisage for the preliminary reference procedure in the coming years (Section 6).

Next, Chapter 2 analyses the use of the procedure and discusses the variations in frequency of references between the different Member States. Chapter 3 discusses which bodies may make preliminary references while Chapter 4 examines which questions can be referred for a preliminary ruling. Chapter 5 discusses the requirement that an answer to the preliminary question is relevant for the resolution of the main proceedings. Chapter 6 defines when a national court must make a preliminary reference. Chapter 7 discusses when a national court that is not obliged to make a preliminary reference should make such a reference. The form and content of a preliminary reference is the subject of Chapter 8. Chapter 9 provides an account of the steps that a national court may take after having made its reference while Chapter 10 contains an analysis of the procedure before the Court of Justice and discusses how written and oral observations may be presented. Chapter 11 examines the preliminary ruling as such, including the extent to which the Court of Justice reformulates the preliminary question. Chapter 12 considers the binding effect of a preliminary ruling. Finally, Chapter 13 describes the rules on costs and legal aid.⁵

2. History and Development of the Preliminary Reference Procedure

The preliminary ruling procedure laid down in Article 234 of the EC Treaty was inspired by various reference systems in the founding Member States. Of particular significance were the procedures in Italian and German law where certain matters are referred to the Constitutional Court for a preliminary ruling. The French system, in which general courts can refer different matters to administrative courts for a preliminary ruling, and vice versa, also served as a model. In comparison, at

⁵ A brief note on terminology: in this book the Court of Justice of the European Communities is referred to as the 'Court of Justice' and only where there is no risk of misunderstanding the term 'Court' will be used. The Court of First Instance of the European Communities is referred to as the 'Court of First Instance'. A national body which fulfils the definition in Art 234 of the EC Treaty of a 'court or tribunal of a Member State' and therefore is entitled to make a preliminary reference is referred to as a 'national court' or a 'referring court'. The term 'body' is used in respect of both entities that are covered by Art 234's definition of a court and those that are not. The terms 'EC' and 'Community' refer only to the EC Treaty and circumstances covered by it. The terms 'EU' and 'Union' refer to the EU Treaty (an exception to this is the use of the term 'union citizen'). Where we refer to the Council, Commission etc, we use the term Community institution even though these institutions also cover matters under the Treaty on European Union.



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the inception of the European Community there was no other system of cooperation between an international court and national courts which could serve as inspiration. The preliminary ruling procedure was thus one of the very first forms of advanced cooperation between national courts and an international court. The procedure has since been a model for the establishment of various national procedures, whereas it has not spread much internationally outside Community law.⁶

The Court of Justice received its first preliminary reference in 1961.⁷ In the early years the number of preliminary references was very limited. In the 10 years from 1960 to 1969 there were only 75 references, in other words an average of fewer than eight per year. Against this background it is hardly surprising that the Court of Justice developed a practice that was characterised by a desire not to discourage references. Among other things, the Court of Justice laid down a broad definition of what was to be considered 'a court or tribunal of a Member State', and it expressly refrained from assessing the relevance of a question referred. Likewise, it applied some rather relaxed requirements regarding the referring court's description of the facts and national law as well as regarding the precision of the preliminary question as such. It was also characteristic that the Court described the relationship between itself and the national courts as that of a non-hierarchical cooperative procedure between equal partners, where each was responsible for clearly defined tasks.

Following its somewhat hesitant beginning the preliminary reference procedure has grown rapidly and today is in danger of becoming a victim of its own success.

In the period between 1961 and 1998, the number of annual references grew by 16 per cent on average, with an overall increase of nearly 100 per cent in the period from 1990 to 1998.⁸ Then came a period where the volume of cases was more or less constant. However, in the last couple of years a new upward trend is recognisable, and in 2008 the Court of Justice received 288 references.⁹ At the end of 2008

⁶ See in more detail H Kanninen, Association of the Councils of State and Supreme Administrative Jurisdiction of the European Union, 18th Colloquium 2002, General Report on the Colloquium subject 'The Preliminary Reference to the Court of Justice of the European Communities', point 3. The most important example is probably the Benelux Court of Justice of 1965. Similarly, the Community Patent Convention of 1989 envisages the establishment of a system in which a supranational court may issue preliminary rulings.

⁷ Case 13/61 *Bosch* [1962] ECR 45 (original reference Rec 1962 89).

⁸ This significant increase of references cannot be attributed to the enlargement of the European Community. Admittedly, Austria, Finland, and Sweden joined the Community during the period, but only in 1996 so that courts in these three Member States only had a marginal influence on the total increase.

⁹ The leading topics were taxation (35 cases), environment and consumers (34 cases), freedom, security, and justice (26 cases), social policy (26 cases), and freedom to provide services (20 cases).



767 cases were pending before the Court of Justice, of which 395 were preliminary references.¹⁰

An important consequence of the large number of references is that the average time taken to deal with each reference is now substantial. Another consequence is that it has become increasingly difficult for the Court of Justice to ensure full coherence within its case law, as it has grown to such magnitude that it has become virtually impossible even for the members of the Court to know all the cases. While in 1975 the time spent dealing with a preliminary reference case was six months, by 2008 the average time had increased to 16.8 months. Indeed, the figure of 16.8 months was a drop from a peak of 25.5 months in 2003. These figures cover wide variations between individual cases, and on several occasions a preliminary ruling has not been rendered until over four years after the national court made the reference.¹¹

Presumably, the considerable time it takes to obtain a preliminary ruling deters a number of national courts from using this procedure even though otherwise the nature of the main proceedings justifies doing so.¹² In a resolution of 9 July 2008 on the role of the national judge in the European judicial system, the European Parliament observes that the duration of the preliminary ruling procedure remains excessively long and considerably reduces the attractiveness of the procedure for national judges.¹³

Presumably, the increase in the volume of cases was a contributory factor to the Court of Justice changing its practice in the mid 1990s on a number of important points regarding preliminary references. During this period the Court tightened the conditions under which a national court may make a reference and it established more stringent requirements regarding the formulation of a preliminary reference.¹⁴ The 1990s also witnessed a change in the Court of Justice's practice

¹⁰ The Court of Justice 2008 Annual Report, point 13 in the chapter on statistics.

¹¹ Case C-142/05 *Mickelson* (ECJ 4 June 2009), where the reference was received at the Court on 24 March 2005. Warnings of the problems flowing from the increased number of preliminary references were given at an early stage, see J Weiler's contribution to a conference in 1985 published in 'The European Court, National Courts and References for Preliminary Rulings—The Paradox of Success: A Revisionist View of Article 177 EEC' in H Schermers, C Timmermans, A Kellermann, and J Watson (eds), *Article 177 EEC: Experiences and Problems* (1987) 366; T Koopmans, 'The Future of the Court of Justice of the European Communities' in A Bårø and DA Wyatt (eds), *Yearbook of European Law* (1991) 1; and H Rasmussen, 'Docket Control Mechanisms, the EC Court and the Preliminary References Procedure' in M Andenas (ed), *Article 177 References to the European Court—Policy and Practice* (1994) 83, 100.

¹² See below Ch 7, s 2.2.

¹³ EP Resolution of 9 July 2008 on the role of the national judge in the European judicial system (AG-0224/2008), points F and 25 available at <<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2008-0352>>.

¹⁴ See below Ch 8. The tightening of the Court's practice regarding access to make preliminary references has not been unequivocal, however. Thus, since the 1990s it has increasingly accepted



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whereby still more emphasis was put on the procedural rights of those entitled to present observations in the preliminary procedure before the Court.¹⁵

While the case law has become more detailed, at the same time the exposition of the principles underpinning the preliminary ruling procedure and the allocation of jurisdiction between the Court of Justice and the national courts have become more blurred. In legal literature it has even been argued that the spirit behind the preliminary ruling procedure has come under attack.¹⁶ Moreover, Community law is primarily based on decentralised enforcement, and the most powerful—and for the Court of Justice the most dangerous—means whereby the national courts can show their dissatisfaction is by refusing to recognise the rulings of the Court of Justice. From a strategic point of view, therefore, good relations with the national courts continue to be of considerable importance to the Court of Justice.¹⁷

While such concerns may seem somewhat exaggerated, the continued increase in cases before the Court of Justice entails a risk that, in the long run, the system will end up in a gridlock which may put the preliminary reference system into jeopardy. For that reason, several measures have been taken in order to make the Court better suited to dealing with the pressure of cases—measures that have already shown their positive effect. Indeed, the average 16.8 months that it now takes to process a preliminary reference is the shortest for many years. Many of the measures taken concern the internal organisation of the Court's working methods and therefore fall outside the ambit of this book.¹⁸ However, the Court has also engaged upon a number of measures that directly affect the preliminary procedure as such; for instance that it increasingly dispenses with the oral hearing.¹⁹ Moreover, the ability to decide cases via a simplified procedure in the form of a reasoned order

references where, strictly speaking, Community law does not apply in the main proceedings. See Ch 4, s 5.3. Moreover, as explained in Ch 6, s 3.4.9, it has refrained from following repeated invitations to relax the national courts of last instance's obligation to make preliminary references.

¹⁵ See Ch 8, ss 3.1 and 3.2.5.

¹⁶ D O'Keeffe, 'Is the Spirit of Article 177 under Attack? Preliminary References and Admissibility' (1998) 23 EL Rev 509.

¹⁷ T Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure' (2003) 40 CML Rev 9, 37.

¹⁸ For example, more cases may be decided by small chambers, the length of the judgments may be kept down (making translation faster), reports for the hearing are made shorter and are normally only translated into a limited number of languages, Opinions by the Advocates General are not given in less important cases and where they are given, as a main rule, the Advocates General are expected to draft their Opinions in one of only a few 'pivot' languages rather than in their own language. See in more detail V Skouris, 'Self-conception, Challenges and Perspective of the EU Courts' in I Pernice et al (eds), *The Future of The European Judicial System in a Comparative Perspective* (2005) 19.

¹⁹ See below Ch 10, s 4.4.1.



has enabled the Court to decide simpler cases more speedily.²⁰ Similarly, the Nice Treaty has introduced the possibility of delivering judgments without the Advocate General giving an Opinion, which has contributed significantly to reducing the length of the proceedings; indeed in 2008, the Court of Justice made use of this possibility in around 41 per cent of all judgments handed down that year.²¹ Finally, the special urgent procedure for handling preliminary references concerning the area of freedom, security, and justice has made it possible to deal more swiftly with these types of cases.²²

3. Outline of the Different Possibilities of Making References to the Court of Justice

3.1. Overview

As observed above in Section 1, Member State courts were first granted the possibility of making preliminary references by Article 41 of the Treaty establishing the European Coal and Steel Community (ECSC).²³ In practice Article 234 (originally Article 177) of the EC Treaty, however, accounts for the vast majority of preliminary references, and today this provision has become almost synonymous with the preliminary reference procedure.

However, there are several bases for making preliminary references to the Court of Justice other than the now defunct Article 41 of the ECSC Treaty and Article 234 of the EC Treaty, some of which are gaining increasing importance. In most respects these other bases correspond to Article 234, but in certain regards there are differences, sometimes differences of considerable importance. Where such differences exist, they are identified and examined in the relevant chapters of this book. In addition, immediately below we provide an outline of these other bases. The most important other bases concern matters within the field of justice and home affairs—often referred to as the European Union's 'third pillar'. Originally the provisions on justice and home affairs were placed in Title VI, Article K, of the Treaty on European Union. Today however, the matters on 'visas, asylum, immigration and other policies related to the free movement of persons' have been transferred to Title IV of the EC Treaty whereas the regulation of police and judicial cooperation in criminal law matters continue to be part of Title VI of the EU Treaty.

²⁰ See below at Ch 10, s 5.1 and Ch 11, s 1.

²¹ Art 20 of the Statute of the Court of Justice and below at Ch 11, s 1.

²² See below at Ch 10, s 5.3.

²³ The ECSC Treaty entered into force on 23 July 1952 and expired on 23 July 2002.

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Access to making preliminary references regarding Title IV of the EC Treaty, as well as those acts which are based on that Title, is regulated in Article 68 of the EC Treaty. Likewise, preliminary references regarding Title VI of the EU Treaty are regulated through Article 35 of that Treaty. We examine these two provisions below in Sections 3.2 and 3.3 respectively. Thereupon, in Section 3.4 we briefly consider references under the Euratom Treaty followed, in Section 3.5, by an examination of the possibility of making references on the basis of certain conventions. In Section 3.6 we consider the possibility of making preliminary references regarding the Community's Common Foreign and Security Policy (CFSP)—often referred to as the 'second pillar'. Finally, in Section 3.7, we explain how the Treaty of Lisbon, if it enters into force, will affect the preliminary reference procedure and the interplay between Articles 234 and 68 of the EC Treaty and Article 35 of the EU Treaty.²⁴

3.2. Article 68 of the EC Treaty

With the adoption of the EU Treaty, asylum and immigration as well as most of visa policy came into the Union framework as part of the intergovernmental cooperation under the third pillar. With the Treaty of Amsterdam this competence was transferred from the EU Treaty to Title IV of the EC Treaty. As part of the EC Treaty, in principle, these matters now come within Article 234, but this is modified by Article 68(1) which provides that preliminary questions on the interpretation of Title IV or on the validity or interpretation of Community acts based on that Title can only be referred to the Court of Justice by national courts 'against whose decisions there is no judicial remedy under national law'. In other words, if a court is not one of last instance it is precluded from referring such questions to the Court of Justice.

Moreover, Article 68 also provides that not only national courts, but also the Council, the Commission, or a Member State may request the Court of Justice to give a ruling on a question of interpretation of Title IV of the EC Treaty or of acts of the institutions of the Community based on that Title (such requests from Member States, the Council, or the Commission are not preliminary references). In paragraph 3 the provision goes on to establish that such ruling shall not apply to judgments of courts or tribunals of the Member States which have become *res judicata*.

²⁴ With the exception of the Treaty of Lisbon we do not cover possible future bases for preliminary references in this book. Nevertheless, it may be observed that on 23 March 2009 the General Secretariat of the Council issued a working paper on a Draft Agreement on the European and Community Patents Court and Draft Statute (Revised Presidency text). This document also includes a proposal for a preliminary ruling procedure. See document 7928/09.

The Commission has proposed that the preliminary ruling scheme under Article 68 is brought into line with the scheme provided in Article 234.²⁵ So far the Council has not followed the proposal and no other measure has been taken. This arguably is in contravention of Article 67 of the EC Treaty.

3.3. Article 35 of the EU Treaty

Title VI of the EU Treaty lays down provisions on police and judicial cooperation in criminal matters. Article 35(1), which was introduced by the Treaty of Amsterdam, gives the Court of Justice jurisdiction to render preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under the EU Treaty's Title VI, and on the validity and interpretation of the measures implementing them.

However, it follows from Article 35(2) that a national court will only be competent to make a preliminary reference under the provision if its Member State has made a declaration accepting the Court of Justice's jurisdiction. In this respect the Member States may either confer the right to make a preliminary reference upon any of its courts in accordance with Article 35(3)(b) or it may confine this right to its courts of last instance in accordance with Article 35(3)(a).²⁶ In other words, Article 35 allows for one of three different scenarios in any Member State:

1. No access to make preliminary references regarding Title VI of the EU Treaty.
2. Any court may make a preliminary reference regarding Title VI of the EU Treaty.
3. Only courts of last instance may make a preliminary reference regarding Title VI of the EU Treaty.

At the time of writing (Summer 2009) 17 Member States have made a declaration conferring the right to make preliminary references upon their courts. Sixteen of these declarations allow any court or tribunal of the respective Member State to make such references whereas one Member State (Spain) has limited this right to courts or tribunals of last instance.²⁷

²⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the Court of Justice of the European Communities—Adaptation of the provisions of Title IV of the Treaty establishing the European Community relating to the jurisdiction of the Court of Justice with a view to ensuring more effective judicial protection of 28 June 2006 (COM(2006) 346 (final)).

²⁶ See further Ch 3, ss 5.3.2 and 5.3.3.

²⁷ The Court of Justice provides a list of the declarations made pursuant to Art 35 of the EU Treaty. This list may be found at <http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/art35_2008-09-25_17-37-4_434.pdf>.



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3.4. The Euratom Treaty

The Euratom Treaty in Article 150 provides for preliminary references regarding that Treaty. Essentially this provision is identical to Article 234. The only differences are that Article 150 of the Euratom Treaty does not mention the European Central Bank and that Article 150(1)(c) provides that the Court of Justice may make a preliminary ruling on 'the interpretation of the statutes of bodies established by an act of the Council, save where those statutes provide otherwise'. The latter formulation may be contrasted with Article 234(1)(c) of the EC Treaty which provides 'the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide'.

The number of references under Article 150 of the Euratom Treaty has been extremely limited.

3.5. Conventions

Over the years, the Member States have adopted a number of 'Community conventions' outside the Treaty framework. Many of these conventions include provisions on preliminary rulings. Under these conventions the competence to refer is often restricted either to the appellate courts and the highest courts or only to the highest courts.²⁸

Of particular significance when it comes to preliminary references based on conventions has been the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters. As of 2002 the Brussels Convention has been replaced by the so-called Brussels I Regulation.²⁹ This regulation is based on Title IV of the EC Treaty which means that preliminary references regarding this regulation are governed by Article 68. Due to the Danish opt-out on justice and home affairs, the Brussels I Regulation does not apply in Denmark. Thus, strictly speaking, the Brussels Convention continues to apply with regard to Denmark. Denmark has, however, entered into an agreement with the Community whereby vis-à-vis Denmark the rules of the Brussels I Regulation replace those of the Brussels Convention within the former's field of application.³⁰ This means that Danish courts have the same rights and duties to make preliminary references in this regard as have the courts of the other Member States.³¹

²⁸ See below Ch 3, s 5.4.

²⁹ Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.

³⁰ Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2005] OJ L299/62.

³¹ Cf Art 6 of Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters



Moreover, it has been pointed out that the Brussels Convention also continues to apply where the Brussels I Regulation does not apply *ratione loci*, ie to overseas territories such as Mayotte (France) and Aruba (the Netherlands).³²

Like the Brussels Convention, the Convention on the law applicable to contractual obligations,³³ the so-called Rome Convention, has been replaced by a regulation, the Rome I Regulation.³⁴ As with the Brussels Convention, the Danish opt-out on justice and home affairs means that the Rome I Regulation will not apply to Denmark. The Rome Convention, therefore, will continue to apply vis-à-vis Denmark.

In addition to the above, there are a number of conventions adopted on the basis of Title VI of the EU Treaty prior to the introduction of Article 35 of that Treaty. These are: the Convention on the establishment of a European Police Office,³⁵ the Convention on the protection of the European Communities' financial interests and the Protocol to that Convention drawn up on 27 September 1996,³⁶ the Convention on the use of information technology for customs purposes,³⁷ the Convention drawn up on the basis of Article K.3(2)(c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union,³⁸ the Convention on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters,³⁹ the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on mutual assistance and cooperation between customs administrations,⁴⁰ the Convention

[2005] OJ L299/62. See also N Fenger and M Broberg, *Præjudicielle forelæggelser for EF-domstolen* (2008) 177–8.

³² C Naomé, *Le renvoi préjudiciel en droit européen* (2007) 68.

³³ [1998] OJ C27/34 (consolidated version).

³⁴ Regulation 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), [2008] OJ L177/6. The Regulation's date of entry into force is 17 December 2009.

³⁵ See protocol drawn up on the basis of Art K.3 of the Treaty on European Union, on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the establishment of a European Police Office [1996] OJ C299/2.

³⁶ Council Act of 29 November 1996 drawing up, on the basis of Art K.3 of the Treaty on European Union, the protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests [1997] OJ C151/1.

³⁷ Council Act of 29 November 1996 drawing up, on the basis of Art K.3 of the Treaty on European Union, the Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the use of information technology for customs purposes [1997] OJ C151/15.

³⁸ [1997] OJ C195/2. See Art 12.

³⁹ Protocol, drawn up on the basis of Art K.3 of the Treaty on European Union, on the interpretation, by the Court of Justice of the European Communities, of the convention on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters [1997] OJ C261/18.

⁴⁰ [1998] OJ C24/2. See Art 26.



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drawn up on the basis of Article K.3 of the Treaty on European Union on driving disqualifications,⁴¹ and the Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters.⁴²

3.6. Preliminary references and the Common Foreign and Security Policy

It follows from Article 46 of the EU Treaty that the Court of Justice has virtually no competence over the Common and Foreign Security policy. A preliminary reference on one of the provisions on the CFSP is therefore very likely to be declared inadmissible.⁴³

Nevertheless, it cannot be completely excluded that situations may arise where the Court of Justice will admit a preliminary reference relating to the CFSP. This might occur where the reference concerns the interaction between the EC Treaty and the CFSP.⁴⁴ Thus, if a national court considers that a CFSP act encroaches upon the EC Treaty, it is likely that in accordance with the EU Treaty's Article 47 read in conjunction with Article 46(f), the Court of Justice will consider itself to be competent to rule on the matter.⁴⁵ For example, this situation could arise in connection with a claim for damages allegedly flowing from the adoption of CFSP acts, and where in this regard there is a question whether the Council has encroached on the competence of the Community.⁴⁶ Likewise, it seems arguable that the Court of Justice may admit a preliminary reference on access to documents under Article 255 of the EC Treaty, even if some or all the documents concern the CFSP.⁴⁷

3.7. The Treaty of Lisbon

In 2005 the Treaty establishing a Constitution for Europe was rejected by the French and the Dutch voters. It was therefore abandoned and in its place the Member States subsequently adopted a reform treaty, normally referred to as the Treaty of

⁴¹ [1998] OJ C216/2. See Art 14.

⁴² Protocol drawn up on the basis of Art K.3 of the Treaty on European Union, on the interpretation by the Court of Justice of the European Communities of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters [1998] OJ C221/20.

⁴³ See in support of this Case C-167/94 *Grau Gomis* [1995] ECR I-1023, para 6; and Case T-299/04 *Selmami* [2005] ECR II-20, paras 52–6.

⁴⁴ K Lenaerts and P Van Nuffel, *Constitutional Law of the European Union* (2005) 903, 905.

⁴⁵ *Ibid.*, 808 *quaere* whether the Court also has jurisdiction to inquire whether a CFSP act of an institution respects a fundamental right.

⁴⁶ See in support of this Case C-354/04 P *Gestoras pro Amnistia* [2007] ECR I-1579, paras 53–4 and Case C-355/04/02 P *Segi* [2007] ECR I-1657, paras 53–4.

⁴⁷ See in support of this the reasoning of the Court of First Instance in Case T-174/95 *Svenska Journalistförbundet* [1998] ECR II-2289, para 85 and (implicitly) Case C-353/99 P *Hautala* [2001] ECR I-9565. See also generally M-G Garbagnati Ketvel, 'The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy' (2006) 55 *International and Comparative Law Quarterly* 77–120.



Lisbon. At the time of writing (Summer 2009) it remains uncertain whether all Member States will ratify the Treaty of Lisbon. If it is ratified it will bring about some—limited—changes to the preliminary reference system. There follows an examination of these changes.

Under the present Treaty scheme, the European Union is based upon three pillars, namely (1) the Community pillar, (2) the pillar on the common foreign and security policy (CFSP), and (3) the pillar on justice and home affairs (of which important parts have earlier been transferred to the Community pillar). The Treaty of Lisbon will abandon this pillar structure, in particular by placing the regulation of justice and home affairs on a par with the regulation of Community matters. Therefore, if the Treaty of Lisbon enters into force, subsequent acts within the field of justice and home affairs will come within the ordinary preliminary reference procedure which today is found in Article 234.⁴⁸ The procedures which today are provided for in Articles 35 of the EU Treaty and 68 of the EC Treaty will be abandoned. Some limited exceptions will continue to apply in the field of justice and home affairs, however. Thus, Article 276 of the new Treaty on the Functioning of the European Union will provide that the Court of Justice of the European Union shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.⁴⁹

The two principal changes to the current preliminary reference arrangement brought about by the Treaty of Lisbon's extension of full jurisdiction to all areas of justice and home affairs (or freedom, security, and justice as it is also called) are as follows.

First, under Article 267 of the new Treaty on the Functioning of the European Union, preliminary references will become possible from all national courts and tribunals on questions relating to asylum, immigration, and civil law matters (ie existing Title IV of the EC Treaty), and not just from courts of last instance.

Secondly, references under Article 267 of the new Treaty on the Functioning of the European Union in the area of criminal law and policing can be made by any national court or tribunal with the exception of courts or tribunals of a Member State that has opted out of this area of the law.

It follows that if the Treaty of Lisbon enters into force, this will have a substantive impact on the possibility of making a preliminary reference in the field of justice

⁴⁸ With the Treaty of Lisbon Art 234 will be renumbered Art 267.

⁴⁹ Today the same limitation is found in Art 35(5) of the EU Treaty.



1. *References for Preliminary Rulings*

and home affairs. Nevertheless, this does not mean that the limitations on preliminary references which presently apply vis-à-vis legal acts in the field of justice and home affairs will cease to apply immediately. On the contrary, Article 35 of the EU Treaty will continue to apply with regard to those legal measures that have been adopted before the entry into force of the Lisbon Treaty. For a number of years this provision will therefore continue to be relevant with regard to preliminary references in the field of police and judicial cooperation in criminal matters.⁵⁰

The Lisbon Treaty also introduces the possibility of an expedited procedure for people in custody. Thus, as a new final paragraph to Article 267 of the Treaty on the Functioning of the European Union (ie Article 234 of the EC Treaty) it will be laid down that if a preliminary question ‘is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay’.⁵¹

Whereas the Court of Justice’s jurisdiction will be considerably increased in the field of justice and home affairs (the ‘third pillar’), the same is not the case with regard to the Common Foreign and Security Policy (the ‘second pillar’). Thus, Article 275 of the Treaty on the Functioning of the European Union will provide as follows:

The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.

However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263(4) of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.

In other words, the Court of Justice will not have jurisdiction to answer preliminary references regarding the Common Foreign and Security Policy—with only some very narrow exceptions regarding compliance with certain procedural rules and with the extent of the powers of the institutions.

⁵⁰ Protocol No 36 on Transitional Provisions in Art 10(1) lays down that the powers of the Court of Justice under Title VI of the Treaty on European Union, in the version in force before the entry into force of the Treaty of Lisbon, shall remain the same, including where they have been accepted under Art 35(2) of the Treaty on European Union. However, in Art 10(3) the Protocol goes on to establish that these transitional measures shall cease to have effect five years after the date of entry into force of the Treaty of Lisbon.

⁵¹ See further below Ch 10, s 5.3.1.



4. References to the EFTA Court

The preliminary reference procedure is not only of relevance to the courts in the Member States of the European Community. It is also important for the national courts in Iceland, Lichtenstein, and Norway, as a result of the participation of these countries in the European Economic Area (EEA).

According to Article 107 and Protocol 24 to the EEA Agreement, an EFTA State that is party to the EEA Agreement can decide that its courts may make references for preliminary rulings to the Court of Justice. So far no such decisions have been taken. The courts in these three EFTA States cannot therefore refer preliminary questions to the Court of Justice. Instead, they must make such references to the EFTA Court.⁵²

The procedure for making a preliminary reference to the EFTA Court is laid down in Article 34 of the 'Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice' (SCA). On most points the procedure under this provision is similar to that laid down in Article 234 of the EC Treaty. These similarities are emphasised by the fact that the EFTA Court follows the practice of the Court of Justice in its interpretation of Article 34 of the SCA. Thus, among other things, the EFTA Court has adopted the case law of the Court of Justice on which criteria to apply when deciding whether a given body constitutes a national court entitled to make a preliminary reference.⁵³ The same applies to the Court of Justice's practice whereby it declares inadmissible questions that are hypothetical and without relevance for the decision in the main proceedings, but at the same time gives the national courts quite wide discretion in assessing the matter.⁵⁴

The EFTA Court has also followed the case law of the Court of Justice in refraining from giving preliminary rulings on issues which the parties to the main proceedings raise before the EFTA Court but which the referring court has not asked about. At the same time, as with the Court of Justice, the EFTA Court has found that this case law does not prevent it from taking into account EEA rules other than the ones mentioned by the referring court in its preliminary reference.

⁵² On the other hand, courts in the EU Member States can, and in certain situations shall, make preliminary references to the Court of Justice in relation to the EEA Agreement under the normal rules in Art 234 of the EC Treaty; see Ch 4, ss 3.3.8 and 5.4.

⁵³ Case E-1/94 *Rastamark* [1994–95] EFTA Court Report 17; and Joined Cases E-8/94 and E-9/94 *Mattel* [1994–95] EFTA Court Report 113. See in more detail Ch 3, ss 2–3.

⁵⁴ Case E-1/95 *Samuelsson* [1994–95] EFTA Court Report 145; Case E-5/96 *Nille* [1997] EFTA Court Report 30; Case E-6/96 *Wilhelmsson* [1997] EFTA Court Report 53; Case E-1/00 *Islandsbanki* [2000–01] EFTA Court Report 8; and Case E-2/03 *Asgeirsson* [2003] EFTA Court Report 185. For a further discussion, see Ch 5.



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Furthermore, the EFTA Court has adopted the case law of the Court of Justice on the requirement that an order for reference should describe the relevant facts and national law sufficiently clearly and comprehensively to enable the EFTA Court to give a useful preliminary ruling based on a correct understanding of the case and its general context.⁵⁵ Finally, with regard to the possibility of interpreting international agreements, the EFTA Court has adopted a view which is substantially similar to that taken by the Court of Justice in relation to the parallel issue in Community law.⁵⁶

However, there are a number of significant differences between the procedure under Article 34 of the SCA and that which applies under Article 234 of the EC Treaty. The main differences are the following: first: under Article 34 of the SCA there is no obligation for courts of last instance to make a reference. Secondly, the EFTA Court only gives an advisory opinion which is not binding on the referring court, let alone on other national courts. And thirdly, the EFTA Court does not have jurisdiction to examine the validity of secondary EEA legislation in the same way that the Court of Justice has jurisdiction to examine the validity of secondary Community legislation.⁵⁷

5. Other Ways of Obtaining Legal Guidance from Community Bodies

5.1. Asking the European Commission for guidance on the interpretation of Community law

5.1.1. *Questions on competition and State aid law*

Procedures whereby national courts may seek assistance from the European Commission have been laid down in the fields of competition and State aid. In some cases these procedures may serve as a substitute for a preliminary reference to the Court of Justice. In this respect, it is of particular importance that the Commission normally will be able to provide an opinion within a significantly shorter time-frame than it takes to receive a preliminary ruling from the Court of Justice. Another important difference is that whilst a preliminary ruling by the Court of Justice is binding on the referring court, such an opinion by the Commission is not binding. Obtaining an opinion from the Commission neither

⁵⁵ Case E-10/04 *Piazza* [2005] EFTA Court Report 76; and see in more detail Ch 8.

⁵⁶ Case E-2/03 *Asgeirsson* [2003] EFTA Court Report 185. For a further discussion, see Ch 4, s 3.3.

⁵⁷ See further on these differences N Fenger, M Sanchez-Rydelski, and T van Stiphout, *European Free Trade Association (EFTA) and the European Economic Area (EEA) in International Encyclopaedia of Laws—Intergovernmental Organisations* (2005) 150ff.



affects the national court's possibility of making, nor (where applicable) its obligation to make, a preliminary reference to the Court of Justice.

In competition matters the Commission's provision of assistance to national courts has been set out in Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty⁵⁸ together with the Commission's 'Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC'.⁵⁹ According to this notice, the Commission's duty to assist national courts in the application of Community competition law first of all consists of an obligation to transmit factual information to these courts. For example, a national court may request certain documents from the Commission or may ask for information of a procedural nature regarding such matters as whether a certain case is pending before the Commission, whether the Commission has initiated a procedure on a certain matter, or whether it has taken a position in a given case. A national court may also obtain information about when the Commission expects that a decision will be taken. Indeed, knowledge thereof may be relevant if the national court considers staying proceedings or adopting interim measures.⁶⁰

The notice also provides that a national court may ask the Commission for its opinion on questions concerning the application of the Community competition rules, including its assessment of economic, factual, and legal matters. In this respect, the Commission will, however, limit itself to providing the national court with the requested information or clarification, without considering the merits of the case pending before the national court. Moreover, the Commission will not hear the parties to the case before it submits its opinion to the national court. The parties must therefore deal with the Commission's opinion as part of the case and in accordance with the relevant national procedural rules.⁶¹

⁵⁸ [2003] OJ L1/1.

⁵⁹ [2004] OJ C101/4.

⁶⁰ The national court's request for assistance may be submitted in writing to: European Commission, Directorate General for Competition, B-1049 Brussels, Belgium or sent electronically to <comp-amicus@cec.eu.int>. Further description of the Commission's practice in cooperating with national courts is given in the Commission's annual reports on Competition Policy.

⁶¹ According to Regulation 1/2003 Art 15(3), the Commission is also competent to submit observations as *amicus curiae* on issues relating to the application and effectiveness of Arts 81 or 82 of the EC Treaty to a national court which is called upon to consider those provisions, see Case C-429/07 *X BV* (ECJ 11 June 2009), and, before the entry into force of Regulation 1/2003, the English case *Hasselblad v Orbinson* [1985] All ER 173. In this respect, Regulation 1/2003 distinguishes between written observations, which the Commission may submit on its own initiative, and oral observations, which can only be submitted with the permission of the national court. As the regulation specifies that observations shall only be submitted when the coherent application of Arts 81 or 82 of the EC Treaty so requires, the Commission in practice limits its observations to an economic and legal analysis of the facts underlying the case pending before the national court. Moreover, the Commission normally only presents observations in appeal cases.



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In the field of State aid the Commission has issued a ‘Commission notice on the enforcement of State aid law by national courts’.⁶² This notice by and large mirrors the above-described notice on cooperation in competition matters. Thus, the State aid notice also envisages two different forms of Commission support for national courts; first, the national court may ask the Commission to provide information that is in the Commission’s possession, and second, the national court may ask the Commission for a non-binding opinion concerning the interpretation of the State aid rules. As in the field of competition, the parties involved in the national proceedings are not heard before the Commission renders its opinion in a State aid matter. Moreover, an opinion under the State aid notice does not consider the merits of the case pending before the national court.⁶³

In a case concerning subsidies within the limits of the environmental support framework, the Dutch *College van Beroep voor het bedrijfsleven* (Administrative Court for Trade and Industry) put various questions to the European Commission that were answered in less than three months. The answers were reproduced *in extenso* in the judgment of the Dutch court.⁶⁴

In *Airport of Eelde*, the Dutch *Raad van State* put questions concerning State aid to the Commission that were answered in less than four months. The Dutch court allowed the parties to the proceedings the possibility of commenting first on the draft questions and, subsequently, on the Commission’s answers.⁶⁵

5.1.2. *Questions that do not concern competition or State aid law*

It is not often that national courts ask the Commission for assistance when deciding disputes involving Community law other than that of competition or State aid law.⁶⁶ It appears that they prefer either to solve the cases themselves or to use the preliminary procedure.

In the limited number of cases where the Commission has been faced with such a request from a national court, the Commission has generally been relatively open to supplying the national court with factual information. Indeed, the Commission is under an obligation to aid the national court with regard to such information, subject to the confidentiality provision in Article 287 of the EC Treaty and applicable secondary law.⁶⁷

⁶² 2009/C 85/01.

⁶³ Requests for support in the field of State aid must be addressed to: European Commission, Secretariat-General, B-1049 Brussels, Belgium.

⁶⁴ AWB/05/59, judgment of 10 July 2007.

⁶⁵ Case 200603116/1, judgment of 11 June 2008.

⁶⁶ H Kanninen, Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, 18th colloquium 2002, General report on the colloquium subject ‘The Preliminary Reference to the Court of Justice of the European Communities’, points 3.8 and 3.10.

⁶⁷ Case C-2/88 *Zwartveld* [1990] ECR I-3365.



In *Canadane Cheese Trading*, the Greek Council of State asked the Commission for information concerning the issue whether Feta cheese was first and foremost sold in Greece. In the opinion of the Greek court an answer to that question was relevant for deciding whether an exclusive right to use the Feta name for cheese made in a special manner was justifiable. After having received this information the Greek court made a preliminary reference to the Court of Justice.⁶⁸

In contrast, the Commission has generally abstained from providing a legal opinion on the interpretation of the Community provisions at issue in the national proceedings. Until now, the Court of Justice has not clarified whether this approach is compatible with the general loyalty clause in Article 10 of the EC Treaty. It is, however, submitted that the obligations of the Commission must depend on the kind of Community rule that the question relates to.

If the dispute before the national court concerns an area where the Commission can issue binding decisions, such as in the fields of State aid and competition law mentioned in Section 5.1.1 above, the Commission arguably both can and should assist the national court with an interpretation of Community law. In this situation, the competence of the Commission to issue an opinion follows logically from its more embracing power to issue binding decisions on the same matter. Moreover, it may sometimes be necessary for the Commission and the national court to coordinate their respective actions regarding these types of Community rules in order to avoid irreconcilable positions being taken.

The legal situation is less clear where the national court's question relates to a Community rule that does not grant the Commission competence to issue binding decisions so that the Commission may only enforce its legal position by initiating infringement proceedings before the Court of Justice under Article 226 of the EC Treaty.

On the one hand, Article 10 of the EC Treaty establishes a general duty on the Commission to loyally cooperate with national courts and to assist them when needed in order to ensure a correct application of Community law. Moreover, the Commission might wish to steer the development of Community law and to make sure that it is applied correctly. Besides, in many instances the Commission has published guidelines and notices on how various Community rules should be applied. It would thus not be a major step if the Commission would assist national courts in specific cases as long as it only makes general observations and refrains from providing a suggestion for the resolution of the specific case before the national court.

⁶⁸ Case C-317/95 *Canadane Cheese Trading* [1997] ECR I-4681; and decisions from the Greek Council of State nos CE 1873 /1993, CE 3381/1995, and CE 2469/1997.



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It may also be argued that, particularly where the applicable Community act has been issued by the Commission, it would be less appropriate if the Commission were to refuse to provide a national court that requested an interpretation of this act and hide behind a statement that only the Court of Justice may provide an authoritative interpretation of the relevant rule. Similarly, some might find that the Commission should be open to assisting the national court in situations where the latter is barred from making a preliminary reference to the Court of Justice, for example because the question concerns an area of Community law where only courts of last instance have been given the right to make preliminary references.

On the other hand, the obligation for the Commission to cooperate loyally with national courts must be construed in light of the overall judicial system laid down in the EC Treaty. Under that system, only the Court of Justice may authoritatively determine the content of Community law. Moreover, with Article 234 the EC Treaty has introduced a special mechanism for national courts to request such authoritative interpretations without giving the Commission any equivalent competence.

Where a national court entertains doubts of such magnitude that it contemplates asking the Commission for advice, it might be presumed that the right interpretation of the relevant Community provision is open to doubt. However, if the Commission offers the assistance requested by the national court the result might be that the national court refrains from making a preliminary reference to the Court of Justice on the matter. Thus, not only will the Court of Justice not be given the possibility of authoritatively clarifying the obscure Community law provision; if the ruling of the national court is not subject to appeal the failure to refer the question to the Court of Justice may constitute a violation of the obligation on courts of last instance to make a preliminary reference as laid down in Article 234(3).⁶⁹

Moreover, even when the question stems from a court against whose decision a right to appeal exists, for the Commission to provide the national court with a form of assistance that the Treaty has placed in the hands of the Court of Justice could constitute a '*détournement de procédure*'. At the very least, one would have to admit that such a practice would not provide for the same legal guarantees as does the preliminary reference procedure laid down in Article 234.

First, an opinion given by the Commission cannot be considered to reflect the position that the Court of Justice would have taken in a preliminary ruling on the same matter. Indeed, this is clear from the fact that the Court of Justice does not invariably follow the observations made by the Commission as *amicus curiae* in

⁶⁹ See below Ch 6, s 5.



preliminary rulings. In fact, there is not even a guarantee that an opinion given by one of the Commission's directorates general (departments) will eventually correspond to the position that the Commission may take should the same question subsequently be raised in a preliminary reference.

Second, whereas both Member States and Community institutions have a right to present observations in a preliminary reference procedure before the Court of Justice,⁷⁰ neither will normally be invited to present their view on the matter before the Commission provides an opinion to the national court. Not only does this mean that the Commission's answer is likely to be given on a less informed basis than is a preliminary ruling by the Court of Justice; it may also raise issues of rights of defence in cases where the Commission's interpretation implies that national law is incompatible with Community law. Indeed, the alternative to having the national court striking down the national legislation on the basis of a Commission opinion might sometimes be that the Commission commences infringement actions against the Member State regarding this legislation. In such proceedings the Member State concerned will have a right to be heard both before the Commission reaches its own position on the matter in a reasoned opinion and if the case ends up before the Court of Justice.

5.2. Asking the European Ombudsman for guidance on the interpretation of Community law

National ombudsmen do not qualify as courts within the meaning of Article 234 and they can therefore not obtain preliminary rulings from the Court of Justice.⁷¹ However since in some respects ombudsmen's workings resemble those of an administrative court and, generally speaking, public authorities comply with ombudsman opinions, it has been recommended that national ombudsmen should have access to obtaining authoritative advice on the correct interpretation of Community law.⁷² To some extent, this need is met by the national ombudsmen's access to a 'report' of the European Ombudsman on a query concerning EU law and its interpretation.

Thus, in September 1996 the national ombudsmen and similar bodies together with the European Ombudsman agreed upon a procedure whereby the European Ombudsman will receive queries from national ombudsmen about Community law and either provide replies directly or channel the query to an appropriate

⁷⁰ See below at Ch 10, s 3.1.

⁷¹ See Ch 3, s 3.2.4.

⁷² M Broberg, 'Preliminary References by Public Administrative Bodies: When Are Public Administrative Bodies Competent to Make Preliminary References to the European Court of Justice?' (2009) 15 *European Public Law* 207, 220.



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Union institution or body for response.⁷³ As of January 2009, 35 such queries had been received with a tendency towards an increase.⁷⁴

The query procedure is based on a non-binding policy agreement between the members of the European network of ombudsmen and is not mentioned in the European Ombudsman's Statute or the Ombudsman's Implementing Provisions. Basic guidelines for the handling of queries are, however, provided in the European Ombudsman's *Legal Officer Handbook*.⁷⁵

In practice the European Ombudsman will forward the query to the relevant Community institution (usually the Commission) for an opinion and, normally, the Ombudsman does not consider it necessary to carry out an independent and separate examination of the legal issues involved if the opinion obtained is satisfactory.⁷⁶

This has been reflected in the European Ombudsman's report on a query from the Danish Ombudsman where for reasons of confidentiality the Danish Ombudsman asked the European Ombudsman not to submit the case to any other authority, including the European Commission. The European Ombudsman observed that he had no authority to engage in a procedure such as the Article 234 procedure under the EC Treaty, by providing interpretation of Community law provisions in pending cases, which concerned national authorities. Although one could argue that nothing hinders an abstract interpretation of the provisions in question by the European Ombudsman, such an interpretation would in reality find either in favour of or against the national authority concerned. Due consideration had also to be given to the fact that the Statute of the European Ombudsman explicitly provided that no authorities other than Community institutions and bodies came under his mandate. Therefore, the European Ombudsman had to limit himself to undertaking research to provide the Danish Ombudsman with all necessary elements for the case he was examining.⁷⁷ In the actual case the European Ombudsman concluded that there was no case law that directly took a view on the question, that no literature dealing with the question had been found, and that in the preparatory works on the relevant Community act there appeared to be no view on the specific questions that interested the Danish Ombudsman, although a *passus*

⁷³ Letter from the European Ombudsman to the Network of National Ombudsmen and similar bodies of 4 October 1996. The quotation has, inter alia, been reproduced in the European Ombudsman's Annual Report 2000 at p 197. See also Statement adopted at the Sixth Seminar of the National Ombudsmen of EU Member States and Candidate Countries, Strasbourg 14–16 October 2007 available at <<http://www.ombudsman.europa.eu/liaison/en/statement.htm>>.

⁷⁴ Letter of 30 January 2009 from the European Ombudsman P Nikiforos Diamandouros to the authors.

⁷⁵ The *Legal Officer Handbook* is a purely internal and non-binding document.

⁷⁶ eg The European Ombudsman's Annual Report 1999 at p 242.

⁷⁷ Query Q1/99/PD reported in The European Ombudsman's Annual Report 1999 at pp 243–4.



in the explanatory memorandum on that act 'could have a bearing on the question'.⁷⁸

It thus appears that the query procedure primarily functions as a kind of transmission service whereby the European Ombudsman assists the national ombudsmen (and similar bodies) in obtaining an opinion by the relevant Community institution.

In 2008 the European Ombudsman received a query from the Danish Ombudsman on the interpretation of 2003/4 on public access to environmental information. Following an eight-page reply from the Commission the European Ombudsman welcomed the Commission's thorough and well-reasoned opinion on the query and, in the light of the content of that opinion and recalling that the Danish Ombudsman had no comments to make on it, the European Ombudsman considered that the issues raised in the query had been adequately addressed and clarified. The European Ombudsman therefore closed the query.⁷⁹

Where for one reason or another it is not possible to obtain such an opinion the European Ombudsman will assist the national ombudsman who has made the query by providing relevant legal sources that may be of relevance in answering the query. In contrast, the European Ombudsman will normally not express his own opinion as to the interpretation or validity of the Community act in question.⁸⁰

The assistance provided by the European Ombudsman to the national ombudsmen and similar bodies may be of substantial help to the latter. Nevertheless, we have a reservation regarding the European Ombudsman's practice of transmitting the query to the relevant Community institution to obtain its view on the interpretation or validity of the Community act in question and, in most cases, simply forwarding this opinion to the national ombudsman who has made the query with the rubric that the European Ombudsman has no remarks to make on the Community institution reply. To our mind, the Community institution cannot always be regarded as an independent arbiter in relation to these Community acts where it may have been responsible for their adoption or is responsible for enforcing Member State compliance therewith. Indeed, this presumably is one of the reasons why the national ombudsmen do not contact the Commission (or other Community institution) directly in order to obtain guidance on the interpretation

⁷⁸ The European Ombudsman's Annual Report 1999 at p 245.

⁷⁹ Query Q5/2008/PB from the Danish Ombudsman to the European Ombudsman on the interpretation of Directive 2003/4 of 28 January 2003 on Directive 2003/4 of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313 [2003] OJ L41/26.

⁸⁰ This has also been established in the European Ombudsman's Legal Officer Handbook for the handling of queries. For an apparent exception, see the case reported in the European Ombudsman's Annual Report 2007 at p 93.



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of Community law. It is therefore problematic that through the formal intervention of the European Ombudsman the opinion of the Community institution is given a rubber stamp which does not appear fully justified. It follows that it may be worth considering a revision of the present practice.

6. The Preliminary Reference System in the Future

6.1. Overview

As explained above in Section 2 of this chapter, the number of references is so high that the time it takes to receive an answer has become inconveniently long. In order to meet these problems the Court of Justice has taken a number of steps to manage its case load more effectively and has succeeded in bringing down the time it takes to process a preliminary reference. Indeed, the present average length of preliminary proceedings is the lowest in 20 years, and over the past five years there has been a continuous reduction in the average handling period.

To some extent the more recent reduction in the average handling time may be attributed to the two latest enlargements of the European Union and the consequent increase from 15 to 27 judges sitting in the Court. Until now this expansion has not been followed by a similar increase in cases from the new Member States.⁸¹ There is normally a certain time-lag before the full weight of a new Member State is reflected in the Court's case load.⁸² Thus, it may be expected that within the foreseeable future there will be a substantial growth in the number of both preliminary references and direct actions relating to the new Member States. At the same time there has been an extension of the areas of law in which it is possible to make a preliminary reference. The Court is increasingly called upon to deal with asylum, immigration, and the Schengen *acquis*, and a number of areas under the heading of judicial cooperation have come under the EC Treaty (ie the 'first pillar') and are therefore now subject to references for preliminary rulings.⁸³

The future challenge for the preliminary procedure is thus to achieve a balance where the Court is not asked to treat more cases than it can handle while still ensuring that Community law is being developed primarily by the Court of Justice itself. Indeed, if no measures are taken it is not unlikely that both the unity and the

⁸¹ See Tables 2.2 and 2.3 in Ch 2, s 1. M Bobek, 'Learning to talk; Preliminary Rulings, The courts of the new Member States and the Court of Justice' (2008) CML Rev Vol 45 1611, 1642, notes that the increase in the number of judges has not been matched by a proportionate reduction in the length of proceedings. However, a proportionate reduction was not to be expected considering that much of the time spent on a preliminary reference is connected with work such as translation which is not dependent on the capacity of the Court's judges.

⁸² See below Ch 2, s 1.2.

⁸³ See below at Ch 4, s 2.3.



impact of the Court's decisions will diminish as their number increases and as they deal more frequently with questions of secondary importance or of interest only in the context of the case concerned.

In the following sections we will discuss various measures that may be taken in order to cater for the problems that will flow from the expected increase in the number of references. We first consider the possibility of transferring (some) preliminary reference cases to the Court of First Instance (Section 6.2). Thereafter we examine the so-called green light procedure, ie a procedure where the referring court explains how it believes that the preliminary question should be answered following which the Court of Justice may either give a green light to the proposed solution or admit the case for normal consideration, thus itself giving a preliminary ruling (Section 6.3). Following this, we look at what is normally referred to as docket control, meaning that the Court of Justice is given the power to choose which of the preliminary references it will admit for a normal examination and which it will decline to consider (Section 6.4). Another way that has been suggested for coping with the expected problems is to limit the right of national courts to make preliminary references so that only references by courts of last instance will be admitted. This suggestion will be discussed in Section 6.5. We then consider the possibility of introducing decentralised Community courts to relieve the pressure on the Court in Luxembourg (Section 6.6). Finally, in Section 6.7 we sum up what, in our opinion, is the best way forward.

6.2. Transfer of preliminary cases to the Court of First Instance

With the Nice Treaty, Article 225 of the EC Treaty was amended so as to allow the Council to decide that the Court of First Instance shall be given jurisdiction to give preliminary rulings in 'specific areas' which are to be laid down by the Court's Statute. The relevant parts of Article 225 read as follows:

3. The Court of First Instance shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 234, in specific areas laid down by the Statute.

Where the Court of First Instance considers that the case requires a decision of principle likely to affect the unity or consistency of Community law, it may refer the case to the Court of Justice for a ruling.

Decisions given by the Court of First Instance on questions referred for a preliminary ruling may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Community law being affected.

To date the Court of First Instance has not been attributed any such preliminary cases. Nor is a future transfer on the immediate agenda. To some extent this may be explained by the fact that presently the case load of the Court of Justice is smaller than that of the Court of First Instance meaning that on average the Court



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of Justice spends less time on processing its cases than does the Court of First Instance.⁸⁴ A prerequisite for transferring cases therefore seems to be an increase of judges in the Court of First Instance from the present 27.

Several provisions in the Statute of the Court of Justice and its Rules of Procedure have already been introduced to cater for such a transfer.⁸⁵ These provisions shall ensure that where there is a serious risk of the unity or consistency of Community law being affected, the Court of Justice shall be given the powers to review a preliminary ruling of the Court of First Instance. In the first place this review will be performed by the First Advocate General of the Court of Justice who may propose, within one month of delivery of a preliminary ruling of the Court of First Instance, that the Court of Justice reviews that ruling. Within one month of receiving this proposal, the Court of Justice shall decide whether or not the preliminary ruling should be reviewed. If it decides in the affirmative it will deal with the case by means of an urgent procedure. If at that point the Court of Justice finds that the preliminary ruling of the Court of First Instance affects the unity or consistency of Community law, the answer it gives to the preliminary question will replace the one initially given by the Court of First Instance.

In addition, instead of processing a preliminary reference at the very outset of the procedure the Court of First Instance may itself refer a case to the Court of Justice if the case requires a decision of principle likely to affect the unity or consistency of Community law. While arguably these safety valves are necessary to ensure the coherence of Community law, they simultaneously make the preliminary reference procedure more complicated and in those situations where these special procedures are actually put into use, they are likely to mean that the procedure will take even longer than is the case today.

One problem in relation to a transfer of 'specific areas' of preliminary cases to the Court of First Instance is the difficulty in identifying areas of Community law that constitute separate bodies of law whose interpretation is unlikely to affect other areas of law. It has been argued that transferring certain groups of cases to the Court of First Instance may risk compromising the need for uniform interpretation.⁸⁶ Indeed, considering that any subject matter of Community law may involve aspects of Community constitutional law, it would not be easy to separate so-called 'constitutional issues', to be reserved to the Court of Justice, from other types of issues, susceptible to be transferred to the Court of First Instance.⁸⁷

⁸⁴ C Naomé, *Le renvoi préjudiciel en droit européen* (2007) 34.

⁸⁵ Arts 62–62b of the Statute as well as Arts 123a–123e of the Court's Rules of Procedure.

⁸⁶ R Colomer, 'La réforme de la Cour de justice opérée par la traité de Nice et sa mise en oeuvre future' (2001) *Revue trimestrielle de droit européen* Vol 37, No 4 2001, ss 705–725.

⁸⁷ K Lenaerts, 'The unity of European law and the overload of the ECJ—the system of preliminary rulings revisited' in I Pernice et al (eds), *The Future of The European Judicial System in a Comparative Perspective* (2005) 212, 233.



That being said, it seems likely that this problem will only materialise infrequently.⁸⁸ Most preliminary questions are of a rather technical nature. They thus relate to questions that would in many national legal systems never arrive at a supreme court and it is therefore not obvious why in a two-instance system Community law should not be able to live with a similar treatment to that in national legal systems. Moreover, it is not easy to see why every single constitutional issue or problem of unity and coherence must necessarily be dealt with by the Court of Justice; in our opinion only novel, complex, and important issues need to be decided by the Court of Justice itself as the 'supreme court' on European Community law.

The above outlined reservations regarding a transfer of competence to the Court of First Instance seems to be based on a belief that the safeguards provided by the Treaty of Nice and the Statute of the Court of Justice would not suffice to avoid such risks. It is, however, not clear why that should be the case.⁸⁹ Not even the present system guarantees full coherence and unity as most of the cases in the Court of Justice are decided by smaller chambers. Hence, incoherence may already arise under the present scheme where there is no system of rectification like the one envisaged if a transfer of jurisdiction is made to the Court of First Instance.

Others fear that national courts of last instance, in particular, might be less inclined to refer preliminary questions to a court which is not the ultimate court within its own legal system. The logic seems to be that a change of partner in a long-standing relationship might endanger the mutual confidence that the present system is believed to represent.⁹⁰ The validity of these arguments is very difficult to assess. However, they should probably not be overemphasised. Indeed, it does not seem very likely that courts of last instance of the Member States would disregard the obligation to refer laid down in Article 234(3) of the EC Treaty merely because jurisdiction is transferred from the Court of Justice to the Court of First Instance.

In our opinion it might not be ideal to divide competence in the field of preliminary references between the Court of Justice and the Court of First Instance. Nevertheless, if the number of cases before the Court of Justice develops as it is feared they might, radical steps will be necessary. In such a scenario, transferring competence to the Court of First Instance in certain limited fields of the law

⁸⁸ T Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure' (2004) 40 CML Rev 9, 20–1.

⁸⁹ B Vestendorp, 'A Constitutional Court for the EU?' in I Pernice et al (eds), *The Future of the European Judicial System in a Comparative Perspective* (2005) 83, 88, but contrast with Advocate General Colomer in paras 71–4 of his Opinion in Case C-17/00 *De Coster* [2001] ECR I-9445.

⁹⁰ See A Dashwood and A C Johnston, 'Synthesis of the Debate' in A Dashwood and A C Johnston (eds), *The Future of the Judicial System of the European Union* (2001) 55, 63.



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appears to represent the best long-term solution compared to other solutions that have been tabled until now.

Possible areas to be transferred to the Court of First Instance are customs matters and trade mark cases⁹¹ as well as questions relating to the Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.⁹² Moreover, it has been argued that a substantial proportion of preliminary questions involve indirect challenges to the validity of Community legislation and that the substance of such cases is very similar to direct actions under Article 230 of the EC Treaty which at present are already heard by the Court of First Instance. It has therefore been suggested that the Court of First Instance should also be able to deal with such issues of law when they emerge indirectly via national courts as requests for preliminary rulings.⁹³

It is true that a transfer of this type of case might create a certain synergy effect. Moreover, at first sight it may seem odd that different courts hear the case depending on whether it has gone directly to Luxembourg or originates from national proceedings. Nevertheless, as pointed out by Judge Lenaerts, such reasoning overlooks the fact that a judgment of the Court of First Instance in a direct case is subject to full appeal to the Court of Justice on points of law thereby giving the latter an effective vehicle to steer the interpretation and development of Community law. In contrast, a preliminary ruling by the Court of First Instance will not be subject to a right of appeal, but will in principle be definitive, subject only to exceptional review on the proposal of the First Advocate General of the Court of Justice. It could therefore just as well be argued that the parallelism between direct actions and preliminary rulings would be more likely to be broken than achieved by such a transfer, as the Court of First Instance would effectively be delivering quasi-final preliminary rulings in areas of law in which it acts as a true first instance court on points of law when it hears similar issues in direct actions. It will only be possible to achieve full parallelism in those special areas where the Court of First Instance in direct cases functions as an appellate court.⁹⁴

⁹¹ P Dyrberg, 'What Should the Court of Justice Be Doing' (2001) 26 EL Rev 291, 296–7 and J Azizi, 'Opportunities and Limits for the Transfer of Preliminary Reference Proceedings to the Court of First Instance' in I Pernice et al (eds), *The Future of The European Judicial System in a Comparative Perspective* (2005) 241, 251–3.

⁹² Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1. See further O Due, 'The Working Party Report' in A Dashwood and A C Johnston (eds), *The Future of the Judicial System of the European Union* (2001) 87, 89.

⁹³ P Graig and G de Búrca, *EU Law, Text, Cases and Materials* (2007) 499.

⁹⁴ K Lenaerts, 'The Unity of European law and the Overload of the ECJ—the system of preliminary rulings revisited' in I Pernice et al (eds), *The Future of The European Judicial System in a Comparative Perspective* (2005) 212, 234–6 and 256.



Hitherto the Court of First Instance has only had this function in areas that do not give rise to preliminary references, namely staff cases.

6.3. Green light procedures

Another way of dealing with the expected increase in the number of preliminary references is via a so-called 'green light procedure'. Under this procedure, when making a preliminary reference national courts would be encouraged, and perhaps even obliged, to include a proposal suggesting the answers to be given. The Court of Justice may then dispose of the case by giving a 'green light' to this proposal, with or without modifications. Where the Court of Justice does not immediately agree with the referring court's proposal, or where for other reasons the Court is of the view that the case should be dealt with in a more elaborate manner, the case will be submitted for the ordinary preliminary reference procedure.⁹⁵

The green light procedure may take many different forms. In particular, it may be of importance whether the Member States and Community institutions are given the possibility of presenting their view on the substance of the question, whether they are only given the right to comment on the feasibility of giving the green light, or whether they are not given any possibility at all of presenting their view before the Court of Justice has decided whether or not to give the green light.

A variant of this idea consists of a 'red light procedure' whereby the referring court delivers a 'judgment *nisi*', ie a 'draft judgment' that is sent to the Court of Justice together with a preliminary reference; if the Court of Justice then fails to respond to the reference within a given time limit, the national court's 'draft judgment' becomes final.⁹⁶

Depending on the way in which the referring court presents its proposal, both a green light system and a red light system could provide an efficient means for the Court of Justice to dispose of a considerable number of preliminary references. At best, the procedure could enable the Court to find the right balance between, on the one hand, its limited resources and, on the other hand, the need for unity and consistency in the interpretation and development of Community law. In the long run the role of the Court could evolve from its present role of *de facto* semi-adjudication into a role of partial monitoring of the administration of Community law at the national level.

⁹⁵ On such a model see further the Court of Justice's 1999 'Report on the Future of the Judicial System of the European Union'; and the 2000 Report of the Working Party on the Future of the European Communities' Court System (the so-called 'Due Report'). In a resolution of 9 July 2008 on the role of the national judge in the European judicial system, the European Parliament has called for the consideration of a 'green light' system, see point 13 of the resolution.

⁹⁶ A Dashwood and A C Johnston, 'Synthesis of the Debate' in A Dashwood and A C Johnston (eds), *The Future of the Judicial System of the European Union* (2001) 45, 68–9.



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A green light procedure is not without its problems however. For such a procedure to work well, the referring court must have a good knowledge of the relevant field of Community law.⁹⁷ While it might already be tricky to identify the relevant Community law question, it is an altogether more difficult matter to come up with a qualified proposal for its resolution. For that reason, a green light procedure would probably work best if it is merely an option for the referring court which may continue to pose questions under the classical preliminary reference procedure.

In addition, a green light procedure would raise a host of questions concerning the precedent value of the referring court's opinion when it is accepted by the Court of Justice. It should, for example, be clear whether the Court of Justice agrees only with the proposed conclusions or also with the national court's legal reasoning. Presumably, it should be provided that under such a system only a 'normal' preliminary ruling of the Court of Justice with reasons would constitute a binding precedent on national courts other than the referring court.

6.4. Docket control

The US Supreme Court applies a so-called *certiorari* system—sometimes referred to as docket control—whereby it carries out a preliminary examination in order to decide whether to hear a case or let the decision of the lower court stand without having been tried by the Supreme Court. It has been discussed whether the Court of Justice should apply a similar system.⁹⁸

Introducing a docket control system would provide a structural response to the expected growth in the number of preliminary references. By allowing the Court of Justice to weed out, at a preliminary stage, cases of lesser importance from the point of view of the uniformity and development of Community law, such a system would enable the Court to concentrate on the most notable issues of Community law. Thereby, the Court might be able to influence the development of the law in a more effective manner than under the present system where much of its time is spent on trifling cases.

A docket control system however involves a risk of distorting judicial cooperation between the national courts and the Court of Justice, which has hitherto been heralded as the heart and soul of the preliminary procedure.⁹⁹ A way of diminishing this risk could possibly be by combining a docket control system with the green light system discussed above, so that in its preliminary reference the national

⁹⁷ X Groussot et al, *Empowering National Courts in EU Law* (2005) 26.

⁹⁸ H Rasmussen, 'Remedying the Crumbling EC Judicial System' (2000) CML Rev Vol 37, 2000, ss 1071–1112.

⁹⁹ A Arnall, 'Judicial Architecture or Judicial Folly? The Challenge Facing the EU' in A Dashwood and A C Johnston, *The Future of the Judicial System of the European Union* (2001) 41, 45, as well as A Dashwood and A C Johnston, 'Synthesis of the Debate', *ibid*, 55, 64.



court would include a proposed reply to the question referred. Such a combination also has the advantage that the proposed reply could provide a basis for the Court's decision as to whether to admit the preliminary question or whether to leave it to the national court to interpret the relevant Community rule itself.

Another advantage of a docket control system is that it is likely to prompt national courts to exercise increased selectivity regarding which questions to refer and thus encourage them to exercise more fully their own functions as Community courts. The other side of the coin however is that if the national courts become too restrained this could jeopardise the preliminary ruling system's objective of ensuring a uniform interpretation of Community law. Moreover, this would place the Court of Justice in a position to 'pick and choose' enabling it to circumvent sensitive issues;¹⁰⁰ arguably it might be possible to eliminate this risk by leaving the decision of which cases to admit to an independent review body.

Finally, one should be hesitant in drawing parallels with the US system. While the US system functions as part of an appeal procedure, the preliminary reference system does not. The US Supreme Court exercises its discretion upon a reading of a decision of a lower federal court, and if the Supreme Court refuses to hear a case, the decision of the lower federal court will stand. In comparison, if a docket control system were to be introduced as part of the preliminary reference system, the Court of Justice would be required to decide on whether to admit the case before the referring court has pronounced its own view on the matter. Moreover, if the Court of Justice refuses to hear the case because it is not sufficiently important or novel, no Community court will have pronounced itself on the issue in doubt.¹⁰¹ Whereas the US Supreme Court occupies a superior hierarchical position vis-à-vis the court whose decision is subject to the docket control decision, the Court of Justice and national courts do not form part of one and the same judicial system and are thus not in a hierarchical relationship with one another. Rather, the preliminary reference system is based on cooperation and dialogue between different types of court each having their respective function.¹⁰² These important differences may make it difficult to introduce a docket control system in a satisfactory manner.

¹⁰⁰ T Koopmans, 'The Future of the Court of Justice of the European Communities' in A Bàròv and DA Wyatt (eds), *Yearbook of European Law* (1991) 1, 30.

¹⁰¹ P Graig and G de Búrca, *EU Law, Text, Cases and Materials* (2007) 496; and T Koopmans, 'The Future of the Court of Justice of the European Communities' in *Yearbook of European Law* (1991) 1, 29.

¹⁰² The Due Report, p 21, and above at s 1 of this chapter.



6.5. Limiting the right to refer to courts of last instance

Another option could be to limit the right to make a preliminary reference to national courts of last instance.¹⁰³ Indeed, this system is already applied today with regard to references under Article 68¹⁰⁴ of the EC Treaty as well as to references made under Article 35¹⁰⁵ of the EU Treaty provided a Member State has made a declaration under Article 35(3)(a) to this effect.¹⁰⁶

Today a large number of references are made by courts other than those of last instance.¹⁰⁷ Therefore allowing only courts of last instance to refer is likely to lead to a considerable reduction in the number of references and thus to a reduction of the time it takes to deliver a preliminary ruling in those few remaining cases.

However, limiting the right to make preliminary references to courts of last instance could have the perverse effect of encouraging litigants to pursue their cases to the highest court simply to gain access to the Court of Justice.¹⁰⁸ This will not only create unnecessary work at the national level, it will also mean that some national cases will take even longer time to solve than is the case today. Moreover, if such a practice were to become widespread, the desired reduction in the workload of the Court of Justice could be more limited than is otherwise expected. In this connection it should not be forgotten, as a main rule, that national courts of last instance are under a duty to refer questions of Community law which arise in the main proceedings.

Second, preliminary references from lower courts have played a crucial role in the development of Community law, and there is no reason to assume that this will not continue to be the case in the future as well. Therefore, restricting lower courts' access to make preliminary references may adversely affect the future development of Community law.

Thirdly, a system with restricted access to make preliminary references may negatively affect the uniform interpretation and application of Community law amongst the national courts. Not only may this adversely affect the legal protection that

¹⁰³ For an advocate of such a system, see H Rasmussen, 'Remedying the Crumbling EC Judicial System' (2000) CML Rev Vol 37, ss 1071–1112.

¹⁰⁴ Concerning visas, asylum, immigration, and other policies related to free movement of persons.

¹⁰⁵ Concerning police and judicial cooperation in criminal matters.

¹⁰⁶ The Treaty of Lisbon abandons this limitation on the right to refer. See further s 3.7 above and Ch 3, s 5.3.3.

¹⁰⁷ See below at Ch 2, s 1.3.

¹⁰⁸ O Due, 'The Working Party Report' in A Dashwood and A C Johnston (eds), *The Future of the Judicial System of the European Union* (2001) 87, 88, and Schermers, 'Problems and Prospects', in the same book at 31 (33–4).



Community law offers, it could also be argued that it might alienate lower courts from Community law.¹⁰⁹

Moreover, a limitation like the one set out here will mean that questions which primarily arise in cases that rarely reach the highest national courts are unlikely to be referred to the Court of Justice. In practice it means that important questions of Community law may never reach the Court of Justice if such questions arise in those cases where normally the parties do not have the necessary resources to bring the question all the way to the highest national courts.

Fourthly, the Court of Justice has sole jurisdiction to declare a Community act invalid. Therefore, if a question of the validity of a Community act arises before a national court this court is obliged to make a preliminary reference to the Court of Justice before it may declare the Community act invalid. However, where a national court is not competent to make a preliminary reference it will be placed in an unacceptable position where it will either have to declare the Community act invalid in contravention of the practice of the Court of Justice, or will have to pass judgment based on a Community act that the national court considers to be invalid.¹¹⁰

In conclusion, limiting the access to make preliminary references to courts of last instance would not be a recommendable solution to the problems connected to the Court's case load.

6.6. Decentralised Community courts

Finally, a radical way of relieving the preliminary reference pressure on the Court of Justice is by setting up a number of regional courts that may undertake parts of the work that weighs on the Court today.¹¹¹ This could be done either by setting up a number of new Community courts or by appointing a number of existing national courts to act as specialised Community law courts. Either way, the regional courts would be subject to some kind of control by the Court of Justice.

Creating such regional courts to answer preliminary questions would do much to put the Court of Justice in a position where it could focus upon the most important Community law issues. Another advantage of a system whereby regional courts answer preliminary references would be its proximity to the referring national courts and the parties to the main proceedings. This would particularly be the case if one were to establish decentralised Community courts in all Member

¹⁰⁹ See further the discussion by F Jacobs, 'Introducing the Court's Paper' in A Dashwood and A C Johnston, *The Future of the Judicial System of the European Union* (2001) 9, 11.

¹¹⁰ See below at Ch 6, s 4.2.2.

¹¹¹ J Jacqué and J Weiler, 'On the Road to European Union—A new Judicial Architecture: An Agenda for the Intergovernmental Conference' (1990) 27 CML Rev 185, 192.



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States, as these courts would then be able to operate in the language of the referring court, thereby also removing the need for expensive and time consuming translation.

At the same time a decentralisation of the system will make it more difficult to ensure the requisite unity and coherence of Community law. Indeed, it has been argued that the location of the Court of Justice in one place has a significant integrative effect and contributes to ensuring the unity and coherence of the law. In comparison, decentralising the system entails a risk that 'national' or 'regional' Community law may develop.¹¹² Therefore some kind of appeal procedure to the Court of Justice would have to be established.¹¹³ Such a structure would, however, bear a clear resemblance to a federal structure. Moreover, whenever a ruling by one of the regional courts was examined by the Court of Justice this could lead to unduly long delays.¹¹⁴

In conclusion, in our opinion, regional courts should not be the first choice for solving the problems stemming from the expected increase in the number of preliminary references.

6.7. The best way forward?

To sum up, today the time it takes for the Court of Justice to answer a preliminary reference has become inconveniently long. To meet this problem the Court has taken a number of steps and this has indeed brought the average length of preliminary proceedings to its lowest in 20 years. Nevertheless, the time it takes to receive a preliminary ruling continues to be inappropriately long and in addition it is likely that the number of references will increase significantly in the future. Firstly, it may be expected that courts in the new Member States will use the preliminary reference procedure increasingly in the years to come. Secondly, references concerning matters relating to Title IV of the EC Treaty and Title VI of the EU Treaty

¹¹² S Prechal, 'The Preliminary Procedure: a role for legal scholarship?' in *The Uncertain Future of the Preliminary Rulings Procedure*, Symposium Council of State, the Netherlands, 30 January 2004; A Arnall, 'Judicial Architecture or Judicial Folly? The Challenge Facing the EU' in A Dashwood and A C Johnston, *The Future of the Judicial System of the European Union* (2001) 41, 45; and O Due, 'The Working Party Report', *ibid*, 87, 88.

¹¹³ According to the proposal made by J Jacque and J Weiler, preliminary rulings made by the regional courts would be open to appeal by the parties in the main proceedings, the Commission, the Council, the European Parliament, and/or the Member States, but it would still be within the discretion of the Court of Justice whether to hear the appeal. An appeal would be granted if the case raised an important issue of Community law, if the regional court decision created inconsistency between the jurisprudence amongst the regional courts, or if the Court of Justice believed that a clear error of law had been committed, see J Jacqué and J Weiler, 'On the Road to European Union—A new Judicial Architecture: An Agenda for the Intergovernmental Conference' (1990) CML Rev Vol 27 185, 193.

¹¹⁴ T Koopmans, 'The Future of the Court of Justice of the European Communities' in A Bårøvn and DA Wyatt (eds), *Yearbook of European Law* (1991) Vol 11, 28.



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are likely to continue to increase. Thirdly, if the Treaty of Lisbon enters into force it will mean that more Member State courts will be able to make preliminary references regarding those matters which today are covered by Title IV of the EC Treaty and Title VI of the EU Treaty.

In other words, if no preventive measures are taken there is a risk that the efficiency of the preliminary ruling system will be seriously threatened. To meet this threat, should it materialise, a number of different solutions have been put forward. The most important of the proposed solutions have been considered above. All of these proposed solutions display strengths as well as weaknesses. One solution, however, stands out as superior, namely the transferring of (certain) preliminary references to the Court of First Instance.